

Statement of Jon Rand
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On behalf of the National Association of Broadcasters
Hearing before the House Committee on Energy and Commerce
Subcommittee on Telecommunications and the Internet
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Good morning Chairman Markey, Ranking Member Upton, and Subcommittee Members, my name is Jon Rand. I am the General Manager of KAYU, Fox 28 in Spokane, WA/Coeur d'Alene, ID; KCYU, Fox 41 in Yakima, WA; and KFFX Fox 11 in Pasco/Richland/Kennewick, WA. I have worked in the broadcast industry for a total of 31 years, and have been General Manager of these television stations serving Eastern Washington and Northern Idaho since 2001. I also serve on the Small Market TV Advisory Committee of the National Association of Broadcasters (NAB), on whose behalf I am testifying today. NAB is a trade association that advocates on behalf of more than 8,300 free, local radio and television stations and also broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the Courts.

This morning I'm here to assure members of this Subcommittee that local broadcasters share your concerns and those of parents about the images children are exposed to through the media – and that we are doing something about it. My stations have committed to a long-term public service campaign called Healthy Choices=Healthy Families. This campaign focuses on childhood obesity, and aims to provide nutrition, exercise and other important information to help parents combat obesity and related child health problems. Through the on-air and on-line

resources of our stations, we are working to educate parents and children about lifestyle choices to improve the health of the families in our viewing area.

Beyond addressing concerns about childhood obesity and health, broadcasters are also responding to parental and governmental concerns about depictions of violence in the media. Currently a wide and growing range of tools are available to help parents guide their children's television consumption. A broad coalition of broadcasters, cable operators, program producers and others, moreover, are now conducting an extensive campaign to educate parents on how they can use these myriad of tools to control effectively their children's television viewing. Empowering parents in this manner is a better – and more First Amendment friendly – way to address concerns about content on television than legislation seeking to restrict the programming that all viewers, including adults, can watch on television.

Local Broadcasters Are Actively Responding To Concerns About Childhood Obesity and Health

Beginning in January of this year, our stations serving Eastern Washington and Northern Idaho began an extensive, long-term public service campaign called Healthy Choices=Healthy Families. This campaign focuses on childhood obesity, and intends to provide nutritional, exercise and other important information to help parents combat obesity and related child health problems, such as juvenile diabetes. We believe that the combined resources of television and the Internet can be harnessed to educate parents and children about lifestyle choices to improve the health of the families in our viewing audience.

Specifically, our stations have created a series of public service announcements (PSAs) focusing on nutrition and diet, exercise and related health information. The PSAs have covered such topics as nutritious snacks for children, ideas for working out as a family, and even the nutritional needs of expectant mothers. These PSAs air continuously, seven days a week at all

hours. To provide more detailed information and additional resources to parents and children, our PSAs refer viewers to the Healthy Choices page of our stations' websites, or to the websites of other organizations that can offer specialized information. And beyond PSAs, the local news broadcasts on our stations will this summer begin to air features related to this campaign. To drive home the message of this campaign, we repeat the Healthy Choices=Healthy Families tag line when our stations make their station identification announcements.

Beyond air time on our television stations, the Healthy Choices campaign fully utilizes on-line resources as well. For example, the Healthy Choices page on KAYU's website provides extensive information on childhood obesity, obesity-related health risks, nutrition and diet, and physical fitness for families. So parents can more easily obtain expert information, we provide links to other organizations, including the Centers for Disease Control and Prevention (CDC), the Weight-control Information Network (WIN) and the United States Department of Agriculture (USDA). The specific topics on which parents can find information through our stations' websites include dietary guidelines, recipe ideas and meal planning, children's nutrition and kid-friendly recipes, information on local recreational activities and classes, including programs of the YMCA and local parks and recreations department, and information on local lakes, parks, trails and conservation areas. In addition, KAYU's website provides a list and the biographies of health care specialists, including pediatricians, dieticians and psychologists, several of them associated with the local Sacred Heart Medical Center and Children's Hospital. Finally, our campaign includes "An Apple A Day," an on-line advice service for children's health issues. Parents can submit by e-mail questions about kids' health, and these questions are answered by our panel of experts in a monthly web cast.

To make our campaign more successful and useful to viewers, we have marshaled the resources of local partners. For example, as described above, KAYU has partnered with Sacred Heart Children's Hospital and local medical specialists. Using the resources of local health care professionals, as well as the resources of national organizations such as the CDC, we are able to offer local viewers greatly enhanced and more valuable information about childhood obesity and related health issues. As attested by the attached letter from Sacred Heart, the Healthy Choices=Healthy Families program is already showing positive effects, with more questions coming to the hospital's website and more calls to specialists asking for information.

I want to stress that our stations do not see an end point to this Healthy Choices campaign. We intend to continue adding material, including PSAs, to the campaign to keep it up-to-date and fresh for viewers for the long-term. Thus, this public service campaign represents a significant commitment of resources by our stations. Essentially all work for this campaign has been performed in-house, utilizing the resources of our production and graphics department and using our on-air news personalities in the PSAs. Beyond the time, effort and resources devoted by our stations and employees to create the Healthy Choices campaign, we have donated significant valuable airtime to running the PSAs. From January 1, 2007 through June 19, 2007, our three stations have aired a total of 4461 spots, ranging in length from five seconds to 30 seconds. We estimate the total value of this airtime to be nearly \$109,000.

I also want to emphasize that many other local broadcasters in Washington state and across the country are frequently involved in similarly important public service campaigns in their communities. For example, KHQ, the NBC affiliate in Spokane, WA, last year celebrated the tenth anniversary of its Success By 6 community outreach campaign focused on young children and preparing them for success in school. As part of this campaign, KHQ has provided

information about childhood obesity, including information about nutrition, exercise and juvenile diabetes.

And it is hardly surprising that local stations initiate such programs. After all, local broadcasters are an integral part of their communities – station managers and personnel live, work, join local clubs and organizations, attend church and raise families in the communities our stations serve. As NAB has documented, in calendar year 2005:¹

- Local broadcasters provided over \$10.3 billion in community service, counting donated airtime for PSAs and funds raised for charities and disaster relief.
- More than 19 out of 20 television and radio stations (98 percent) reported helping charities, charitable causes or needy individuals by raising funds or offering other support. More than 19 out of 20 television and radio stations (96 percent of each) were involved in on-air or off-air disaster relief campaigns.
- 61 percent of PSAs aired by the average radio station were about local issues. For the average television station, the figure was 55 percent.
- Local stations provided important support -- including fundraising and awareness campaigns -- for community organizations such as hospitals, fire and police departments, libraries, schools, food banks, homeless and domestic violence shelters, and humane societies, among many others.
- Broadcasters supported and organized community events such as blood drives, charity walks, community cleanups, town hall meetings, health fairs and much more.
- Awareness campaigns organized and promoted by local broadcasters covered the full range of issues confronting American communities today, including alcohol abuse, education and literacy, violence prevention, women's health, drug abuse, children's issues, and hunger, poverty and homelessness. With regard to children's issues specifically, broadcasters have focused on adoption; raising funds for children's hospitals, neighborhood centers, and nonprofits and other agencies serving children; collecting toys, clothing and other items for needy children; and many other initiatives.

Beyond these efforts at the local level in communities across the country, broadcasters at the national level are working to address the childhood obesity issue specifically. Several

¹ National Association of Broadcasters, *National Report on Broadcasters' Community Service* (June 2006) (Online available at <http://www.nab.org/publicservice>).

broadcast companies, including Ion Media, Telemundo, and The Walt Disney Company, serve on the federal Task Force on Media and Childhood Obesity. This Task Force is working to reach a consensus on voluntary steps and goals that the public and private sectors can take to combat childhood obesity.

Concerns About The Content Of Television Programming Are Best Advanced By Empowering Parents

Concerns about the content of some programming, particularly violent depictions and images, have led some to call for Congress to consider legislation barring broadcast of violent television content except during late-night hours. Any such proposal would be fraught with constitutional problems under the First Amendment. This is an area where parents are much better positioned than the government to decide what kinds of programs are appropriate for their children. Currently, a broad and growing range of tools are available to help parents guide their children's television-viewing habits.

The V-Chip and program ratings information can be used by parents to facilitate the supervision of their children's viewing choices. The proportion of parents who have used the V-Chip specifically has "increased significantly" in recent years (from seven percent in 2001 to 15 percent in 2004), and the "vast majority" of those parents (89 percent) said they found it "useful." *Parents, Media and Public Policy: A Kaiser Family Foundation Survey* at 7 (Fall 2004) (61 percent of parents using the V-Chip found it "very useful," while 28 percent found it "somewhat useful"). By 2006, the proportion of parents using the V-Chip had risen to 16 percent, with nearly three out of four parents (71 percent) who had tried the V-Chip finding it "very" useful, significantly up from 2004, and a "higher proportion than for any of the media ratings or advisory systems." *Parents, Children & Media: A Kaiser Family Foundation Survey* at 10 (June 2007). Significantly, among parents aware of the V-Chip but who have chosen not to

use, 60 percent report that they usually monitor their children's television viewing in person and 20 percent say they "trust their children to make their own decisions." *2004 Kaiser Report* at 7. Thus, parents declining to use the V-Chip are not doing so because they think the technology is ineffective, not useful, or too difficult or complicated to employ. Moreover, 82 percent of parents have purchased new television sets since January 2000, when the requirement that all televisions over 13 inches be equipped with a V-Chip went into effect, so the vast majority of homes can be presumed to have V-Chip equipped televisions. *2007 Kaiser Report* at 9. Parents with older television sets that lack a V-Chip can separately purchase V-Chip technology to use with existing sets.

And even significantly greater numbers of parents use the voluntary ratings systems to guide their children's television viewing. In 2004, 50 percent of all parents reported using the television ratings to "help guide their children's television choices," and the "vast majority" (88 percent) of those parents said that they found the ratings "useful," including 38 percent who reported the ratings to be "very useful" and 50 percent "somewhat useful." *2004 Kaiser Report* at 4-5. By 2006, 53 percent of all parents reported using the ratings system, and the percentage who found them "very" useful rose by 11 percentage points, to 49 percent. *2007 Kaiser Report* at 9.

Beyond the V-Chip and voluntary ratings system, there are a number of additional technological and other tools that empower parents and viewers. As noted by FCC Commissioner Adelstein, cable subscribers have various options available. Digital cable subscribers can use their set-top boxes to block shows with certain ratings, titles, or by time or date, and analog cable subscribers can use their set-top or "lockbox" technology that blocks specific channels (including broadcast channels delivered via cable) so that they can no longer be viewed. Parents can also block pay-per-view and video on demand purchases. Similarly, satellite

television subscribers have access to the Locks & Limits feature on DirecTV and Adult Guard on Dish Network. Digital and personal video recorders permit families to pre-record and watch selected programming whenever they deem appropriate. *See* Report at 32 (statement of Commissioner Adelstein, approving in part and concurring in part). Parents can also obtain third-party ratings about the content of specific programs from a number of family and religious organizations.² Although parents remain concerned about media content, it is not surprising – given all these parental control technologies – that parents now “say they are getting control of their own children’s exposure to sex and violence in the media.” Kaiser Family Foundation, *News Release* at 1 (June 19, 2007).

The television industry is, moreover, now conducting an extensive campaign to educate parents on how they can use these many tools to control effectively their children’s television consumption. NAB, the broadcast networks, the Motion Picture Association of America, the National Cable & Telecommunications Association, the Consumer Electronics Association, DirecTV and EchoStar, and the Ad Council and others are collaborating on a campaign to empower parents so they may better monitor and supervise their children’s television consumption. Broadcast television and radio stations and cable/satellite channels have run and are continuing to run a number of PSAs about parental controls. These PSAs further direct viewers and listeners to www.TheTVBoss.org, where they can learn more about the V-Chip and cable and satellite technologies to better control the television programming coming into their homes. Local stations have placed links to TheTVBoss site on their websites.

² *See* Adam Thierer, *The Right Way to Regulate Violent TV*, The Progress and Freedom Foundation (May 10, 2007), for a thorough discussion of these and additional tools available for parents.

Local broadcasters also assist parents by making determinations about the appropriateness of programming for local communities, and declining to air programs and commercials deemed inappropriate for their local audiences.

Adopting legislation directly regulating programming content on television – especially at a time when consumers have unprecedented control over the video programming that enters their homes – would be overreaching and unnecessary to accomplish the government’s goal of supporting parental choices. Indeed, it would impermissibly substitute the government’s judgment for that of parents, while also interfering with the right of adults to watch what they want. This is a real concern because approximately 68% of the country’s 110 million television viewing households *do not include children under the age of 18 at all*. Thus, for the majority of households in the country, restrictions on content, including violent content, would do nothing but impinge on the viewing choices of adults. In fact, adults over the age of 55 spend *more* time watching television than any other age group, and both children ages 2-11 and teens ages 12-17 spend *less* time watching television than any other age/gender group, except men ages 18-24. *See Nielsen Media Research, 2007 Report on Television* at 20 (2007). The impact of speech-restrictive regulations will be disproportionately felt by adults, not children. And make no mistake, regulating violent television content could easily affect an extremely broad range of the most popular mainstream television programming enjoyed by millions of adults. For example, advocates of restricting violent television content have called *ER* the “second-most-violent series on television in the 2005-2006 season,” due to its “medical violence,” and have also consistently cited other top-rated programs, including *C.S.I.*, *Lost*, *Law and Order* and *Grey’s Anatomy*, as containing problematic violence.³

³ *See* Parents Television Council, *Dying to Entertain: Violence on Prime Time Broadcast Television 1998 to 2006* at 7, 9-13 (Jan. 2007).

A law dictating that such violent content may not be broadcast on television except late at night is very likely to be struck down by the courts. To begin with, it is virtually impossible to come up with a constitutionally acceptable definition of the type or types of violent programming that should be banned from television during most hours. Indeed, despite having three years to consider the issue, the Federal Communications Commission (FCC) itself did not propose a definition in its recent report about violent content on television,⁴ and one of the Commissioners expressed serious doubts about the ability ever to do so. *See* Report at 32 (Statement of Commissioner Jonathan S. Adelstein, approving in part and concurring in part). It is not an accident that no other law on the books in any state or at the federal level restricts violent content. Every attempt to do so – in the context of videos, trading cards, books, and video games – has been struck down by the courts, in part because every definition of targeted violent content runs into problems with vagueness and overbreadth.⁵ Regulations targeting televised depictions of violence -- which are fully protected speech under the First Amendment -- would meet the same fate.

Leaving aside the definitional problem, a law regulating depictions of violence on broadcast television would single out a particular category of protected speech for disfavored treatment. That kind of discriminatory burden on speech is directly at odds with fundamental First Amendment principles, and courts have consistently subjected these content-based laws to

⁴ *Violent Television Programming And Its Impact On Children*, Report, FCC 07-50 (rel. April 25, 2007) (“Report”).

⁵ *See, e.g., Winters v. New York*, 333 U.S. 507 (1948); *Interactive Digital Software Ass’n v. St. Louis County*, 329 F.3d 954 (8th Cir. 2003); *American Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001); *Eclipse Enterprises, Inc. v. Gulotta*, 134 F.3d 63 (2d Cir. 1997); *Video Software Dealers Ass’n v. Webster*, 968 F.2d 684 (8th Cir. 1992).

the strictest form of constitutional scrutiny.⁶ The justifications for regulation that could be offered here are far too weak to satisfy such scrutiny. Prior cases, principally involving attempts to regulate distribution of violent video games to minors, illustrate the problem: the social scientific studies on the effects of exposure to violent material are far too thin a reed to justify content-based regulation of fully protected speech.⁷ These courts, in the context of violent video games, found that the studies presented failed to constitute “substantial evidence” of harm to minors. Scholars have also similarly criticized studies on the effects of exposure to violent television programming.⁸

Some have suggested that the government may nevertheless impose content-based restrictions in the context of over-the-air television broadcasts, citing to the Supreme Court’s decision in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). But that decision has never been expanded beyond the narrow context of so-called “indecent” programming, and provides no support for the government to take the unprecedented step of censoring images of violence. Indeed, there are serious questions about whether *Pacifica* is viable anymore, even in the context of indecency. There remains little, if any, reason to treat the content of broadcast television programs any differently, in terms of First Amendment protection, from the content of other programming delivered alongside broadcast stations over cable and satellite systems. Certainly

⁶ See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *U.S. v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000).

⁷ See, e.g., *Kendrick*, 244 F.3d at 578-79; *Interactive Digital Software*, 329 F.3d at 959; *Entertainment Software Ass’n v. Foti*, 451 F. Supp. 2d 823, 832 (M.D. La. 2006); *Entertainment Software Ass’n v. Granholm*, 426 F. Supp. 2d 646, 652-54 (E.D. Mich. 2006); *Entertainment Software Ass’n v. Blagojevich*, 404 F. Supp. 2d 1051, 1059-63 (N.D. Ill. 2005); *Software Dealers Ass’n v. Maleng*, 325 F. Supp. 2d 1180, 1188 (W.D. Wash. 2004); *Entertainment Software Ass’n v. Hatch*, 443 F. Supp. 2d 1065, 1069-70 (D. Minn. 2006).

⁸ See, e.g., Jonathan L. Freedman, *Television Violence and Aggression: Setting the Record Straight*, The Media Institute (2007).

there remains no meaningful difference in the pervasiveness or accessibility of broadcast television versus other media today.⁹ Courts are thus likely to conclude that broadcast television is entitled to the same level of strong First Amendment protection as other media, including cable television and the Internet.¹⁰ And there is no question that proposed restrictions on televised depictions of violence would fail strict First Amendment scrutiny.¹¹

In short, we understand parents' desire to ensure that their children are not exposed to televised content, including violent images, they believe inappropriate. Broadcasters are continuing to work to inform parents of all the technological and other alternatives for effectively controlling the television programming viewed by their children. Particularly in light of these myriad technological and other alternatives for consumers to control the television programming entering their homes, Congress should refrain from seeking to empower parents by censoring

⁹ For instance, approximately 86 percent of television households now get television, including broadcast channels, via cable, satellite or broadband provider. See FCC, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Twelfth Annual Report, 21 FCC Rcd 2503, 2506 (2006). A plurality of the Supreme Court has found that cable television, like broadcast television, is both pervasive and accessible to children. See *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 744-45 (1996).

¹⁰ See, e.g., *Reno v. ACLU*, 521 U.S. 844, 868, 879 (1997); *Playboy*, 521 U.S. at 813 (applying strict scrutiny to attempts to restrict "indecent" speech on both the Internet and cable television). See also *Fox Television Stations, Inc. v. FCC*, No. 06-1760, 2007 WL 1599032, at *17-18 (2d Cir. June 4, 2007) (describing how cases such as *Playboy* and "today's realities" have undermined *Pacifica*).

¹¹ We note that, even if *Pacifica* were to remain good law at least to some extent, the level of judicial review given to any regulation of violent content on broadcast television would remain stringent. The Supreme Court has clarified that even *Pacifica* permits speech restrictions only if they are "narrowly tailored to further a substantial governmental interest." *FCC v. League of Women Voters*, 468 U.S. 364, 380-81 (1984). This level of "intermediate" scrutiny is not easy to satisfy. See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665-66 (1994). Legislation restricting depictions of violence on television would fail both intermediate and strict scrutiny for the definitional, evidentiary and other reasons discussed.

speech. The availability of less speech-restrictive alternatives renders content-based programming restrictions not only unnecessary but invalid under the First Amendment.¹²

Conclusion

Local broadcasters are an integral part of the communities they serve and thus share the concerns of the viewers and listeners in those communities. These concerns about the well-being of families in Eastern Washington and Northern Idaho have lead KAYU, KCYU and KFFX to commit to a long-term public service campaign focused on childhood obesity and related child health problems. Local broadcasters throughout the country have committed to a myriad of other public service campaigns addressing important problems, as NAB has documented.

Broadcasters are also committed to addressing concerns about the content of programming, including violent content. A broad coalition of broadcasters, cable operators, program producers and others are currently conducting an extensive campaign to educate parents on how they can use the numerous available tools to control effectively their children's television viewing. Empowering parents is a better – and more First Amendment friendly – way to address concerns about content on television than legislation seeking to restrict the programming that all viewers, including adults, can watch on television.

¹² See, e.g., *Playboy*, 529 U.S. at 813, 816; *Reno*, 521 U.S. at 879; *Ashcroft v. ACLU*, 542 U.S. 656 (2004). The Supreme Court has already specifically identified the V-Chip as a type of “less restrictive” alternative for blocking “sexually explicit or violent programs” that renders content-based programming restrictions unconstitutional. See *Denver Area*, 518 U.S. at 756.